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VIA FEDEX AND E-MAIL

Chief, Marine Mammal Conservation Division
Attn: Zero Mortality Rate Goal
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910
Email: 0648-AR15@noaa.gov

Re: Comments on Proposed Rule to Define Zero Mortality Rate Goal

To Whom it May Concern:

This letter is provided on behalf of the Hawaii Longline Association ("HLA") in response to the National Marine Fisheries Service's ("NMFS's") proposed rule defining the Zero Mortality Rate Goal ("ZMRG") under the Marine Mammal Protection Act ("MMPA"). See 69 Fed. Reg. 23477 (April 29, 2004).

The MMPA requires that commercial fishers reduce incidental mortality and serious injury of marine mammals to "insignificant" levels approaching a zero mortality and serious injury rate. The problem with ZMRG begins with the statutory formula for determining the Potential Biological Removal (PBR) that can be allowed for a marine mammal species. To compute PBR, the minimum marine mammal population is multiplied by 50 percent of the maximum annual net reproduction rate. The resulting number is then reduced by multiplying it by a recovery factor of 0.1 for endangered species, 0.5 for threatened or status uncertain species, and 1.0 for others. NMFS now proposes to compute ZMRG by reducing the PBR by 90%. Any fishery exceeding ZMRG would become subject to preparation of a take reduction plan, regardless whether the fishery is classified as a category I or II fishery.[1] This proposal will result in yet another layer of arbitrary regulation upon commercial fisheries in Hawaii, subjecting such fisheries to additional regulatory burdens, legal costs, and economic uncertainties.

[1] In its proposed 2004 List of Fisheries, NMFS states the estimated PBR for False Killer Whales is 1.2; a 90 percent reduction of FKW PBR is less than 1 (0.12). See 69 Fed. Reg. 19365, 19369 (April 13, 2004). Therefore, under the proposed rule, any take of FKW over a five-year period would trigger the requirement to prepare a take reduction plan, regardless whether only one take occurred in the five-year period.

I. The proposed definition of ZMRG is contrary to Congressional intent

A. Legislative history of ZMRG concept

A review of the legislative history of the ZMRG concept demonstrates that any NMFS rule using ZMRG as a regulatory standard designed to return marine mammal populations to their pristine levels is contrary to Congressional intent. In enacting ZMRG, Congress was clear that it did not intend to significantly curtail or shut down fisheries as long as fishermen are using the best available technology "to assure minimal hazards to marine mammal populations." H. Rept. 707, 92nd Cong., 1 5th Sess. (1971) at 24. The Senate Report states ZMRG should be met "through the use of currently available technology. ..." S. Rept. 863, 92 Cong., 2 Sess. (1972) at 6. Any doubt about Congressional intent was dispelled by the Conference Committee, which stated that ZMRG might be the objective, but technology limitations could prevent achieving that goal. H. Rept. 1488, 92nd Cong., 2nd Sess. (1972) at 23. ZMRG is a goal that only has meaning in the context of applying existing technology. The intent of this concept is to use existing technology to reduce incidental marine mammal mortality. ZMRG is not a bright line that, once crossed, requires the imposition of fishery restrictions or closures.

Congress reaffirmed its intent when it considered amendments to the MMPA in 1981. The House Report states ZMRG "is satisfied...by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable." H. Rept. 228, 97th Cong., 1st Sess. (1991) at 17. When Congress reauthorized the MMPA in 1984, it noted the goal of achieving ZMRG was constrained by what is "economically and technologically practicable." H. Rept. 758, 98th Cong., 2nd Sess. (1984) at 6.

Although Congress sought to encourage the development of new technology to reduce incidental interactions with marine mammals, Congress has also stated in no uncertain terms that ZMRG is satisfied by the use of the best available technology that is technologically and economically feasible to employ. Indeed, the Senate Report on the original 1972 legislation made it abundantly clear that using ZMRG as a bright line standard regardless of the economic consequences for the fishermen was unacceptable. S. Rept. 863, 92nd Cong., 2nd Sess. (1972) at 6-7. Congress applied ZMRG to all commercial fisheries in 1994, retaining the concept that regulatory plans to achieve ZMRG should be developed "taking into account the economics of the fishery, the availability of existing technology, and existing State or regional fishery management plans." See 16 U.S.C. § 1387(f)(2).

B. Application of Legislative History to proposed definition

In view of the legislative history, and the conservative nature of PBR calculations, HLA believes that ZMRG should be satisfied for species which are not listed as endangered, threatened, or depleted if the fishery is employing the best available technology that is economically and technologically feasible, provided that incidental mortality and serious injury in the fishery does not exceed the PBR. This proposed definition is fully consistent with the MMPA which defines PBR as the number of animals, not including natural mortalities, which can be removed from a marine mammal stock while still allowing that stock to reach or maintain its optimum sustainable population (OSP). See 16 U.S.C. § 1362(20). Assuming the MMPA's goal is for marine mammal stocks to achieve OSP, then that goal is achieved by using PBR. Arbitrarily reducing PBR for regulatory purposes, let alone reducing PBR by 90%, is unnecessary to achieve the MMPA's biological objectives.

NMFS has defined OSP as a range of population levels between 60%-100% of carrying capacity. See 50 C.F.R.. § 216.3. It is inappropriate, unwise, and likely a violation of law to redefine OSP through this rulemaking only for commercial fishers. Indeed, it could well be argued that the only legally permissible numerical goal for OSP is 60% of carrying capacity, since the MMPA only requires the achievement of OSP and that is accomplished at 60% of carrying capacity. If NMFS wishes to change or clarify the definition of OSP by establishing OSP as a fixed point population level higher than that provided for in existing regulations, then NMFS should do so by separate rulemaking.

In considering the issue of a numerical limitation beyond PBR, it is important to recognize that even without the ZMRG overlay, PBR for protected stocks "is already set at biologically insignificant levels." See 68 Fed. Reg. 40888, 40892 (July 9, 2003). Since PBR alone establishes biologically insignificant interaction levels, it is wholly unnecessary for NMFS to impose even more stringent recovery factors by establishing ZMRG as 10 percent of PBR. NMFS' proposed interpretation is not mandated by statute and is unnecessarily restrictive.

HLA's proposal is fully consistent with other provisions of the MMPA which allow the Secretary to authorize the incidental mortality and serious injury of endangered and threatened marine mammals pursuant to commercial fishing operations if the incidental mortality and injury will have only a "negligible" impact on the species. See 16 U.S.C. § 1371(a)(5)(E). By defining ZMRG in this manner, NMFS can avoid imposing a requirement on Category III fisheries to implement a take reduction plan, thus increasing the regulatory burdens upon the Agency and regulated parties for no legitimate purpose.

II. NMFS must consider the reliability of the available information

The method by which NMFS's determines ZMRG - particularly with respect to the Hawaii longline fishery – has been indirectly addressed in recent litigation. In litigation brought in the federal district court for Hawaii, conservation advocacy groups argued that fishery categorization decisions under the MMPA are subject only to strict application of a mathematical formula based upon data in the latest stock assessment report ("SAR"). However, in rejecting the plaintiffs' claims, the federal district court agreed with NMFS and HLA that NMFS has discretion to place a fishery in either Category II or Category III based upon its assessment of other information and the reliability of the data used in the SAR. See Hui Malama Kohola v. NMFS and HLA (Civil No. 03-00633)(D.Haw. April 13, 2004).

Based upon this recent federal district court decision, NMFS has the lawful discretion to decline a formulaic approach to determining ZMRG if it concludes that available information is sufficiently unreliable. For the reasons addressed below and in the comments of the Western Pacific Fisheries Management Council (which HLA endorses and incorporates by reference), HLA maintains that NMFS is not required to require implementation of a take reduction plan based when estimates of FKW population sizes and fishery interaction rates are highly unreliable. It would be arbitrary and capricious for NMFS to subject the Hawaii longline fishery to such a plan due to the lack of reliable information and the prevailing contrary scientific opinions.

III. NMFS must reconsider and recalibrate its mortality policy

A significant factor in NMFS's MMPA classification system is its data regarding fishery caused mortality or serious injury to false killer whales. HLA submits that there is a high degree of uncertainty and a lack of reliability regarding mortality effects by the Hawaii longline fishery because NMFS apparently assumes that 100 percent mortality is likely for the false killer whales hooked or entangled by the fishery.

Calculation of ZMRG is premised upon the frequency of incidental "mortality and serious injury" to marine mammals. See 16 U.S.C. § 1387(c)(1)(A). Serious injury is defined to mean "any injury that will likely result in mortality." See 50 C.F.R. § 229.2. NMFS's SAR for the Hawaiian stock of false killer whales references unpublished 1998 guidelines that apparently direct the Agency to classify in every instance that the ingestion of a hook, hooking in the mouth or other body part, or entanglement and release trailing gear for small cetaceans as likely to result in mortality.

HLA respectfully recommends that NMFS either revisit its serious injury guidance or, alternatively, that NMFS develop a more refined (i.e., more calibrated than hooked = likely dead) assessment method that it may consider as "other information" bearing upon calculation of ZMRG. Extrapolation of interaction rates at a time when the fishery operated under a vastly different regulatory regime using significantly different fishing methods is not a reliable method upon which to regulate the fishery.

IV. NMFS's population estimates are subject to a very high level of uncertainty

The numerous flaws in extrapolating from the limited population data known about the Hawaiian stock of false killer whales has been acknowledged for some time. Indeed, in recent litigation, the Court held the data available for the 2003 LOF was "inadequate." The proposed 2004 LOF relies upon new data from a 2002 marine mammal survey. However, for several reasons the data regarding the Hawaiian stock of false killer whales remains so suspect that it cannot form the basis for a reasonably reliable regulatory decision.

The 2002 survey was conducted in Hawaiian waters between August and November, at a time when false killer whale abundance is believed to be low. Reliable anecdotal information indicates that Hawaiian EEZ stock of false killer whale exhibit seasonal behavior. Species abundance is believed to peak in Hawaiian waters between June and August in coincidence with the peak in yellowfin tuna abundance. Scientific studies of false killer whales have noted similar seasonal abundance shifts.[2] Accordingly, species and stock specific information reliably indicates it is probable that a fall survey of the Hawaiian stock of false killer whales would underestimate its actual abundance.

There is substantial information indicating that the distribution of false killer whales not only varies by season, but also has been observed to shift less predictably over periods of years. It has been suggested that longer-term distribution changes may be linked to El Nino effects on prey species, other periodic shifts in the distribution of prey or unknown influences. In the present case, although there is some information suggesting that there are identifiable genetic differences among false killer whale populations, the existence of a distinct Hawaiian population of false killer whales has not been confirmed. Nor is the actual distribution of the Hawaiian stock known even if it is distinct. It is certain that in the reality the Hawaiian population is not confined to the Hawaiian EEZ as is predetermined by NMFS's regulatory definition of the stock; however, the extent of its distribution beyond the Hawaiian EEZ is unknown, as is the relative abundance of the population within the nearshore and open ocean areas of the EEZ.

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[2] P.J. Stacey, S. Leatherwood and R.W. Baird 1994. Pseudorca crassidens.

Nevertheless, the highly conservative SAR population estimate assumes a static population confined to the Hawaiian EEZ. Moreover, rather than establish a population estimate at a reasonably expected level from this limited and unreliable data, NMFS instead uses the low end of the population range such that there is an 85 percent likelihood the actual population is higher. In total, all of these uncertainties bias and degrade the reliability of the population estimate well beyond the point of scientific credibility.

V. Summary and Recommendations

HLA recommends NMFS declare that ZMRG is satisfied for species which are not listed as endangered, threatened, or depleted if the fishery is employing the best available technology that is economically and technologically feasible, provided that incidental mortality and serious injury in the fishery does not exceed the PBR. HLA also recommends that NMFS avoid a formulaic approach to establishing ZMRG, and that NMFS reserve its discretion based upon the reliability of scientific information to impose requirements upon fisheries, such as the Hawaiian longline fishery, to implement a take reduction plan when fishery interactions are insignificant.

The best available scientific information indicates the population size of FKWs in the area of the Hawaiian longline fishery is impossible to determine given the limited data available, but the species is both abundant and has one of the largest continuous ranges among all the cetaceans. Indicative of this assessment, FKWs are not designated as endangered or threatened under the ESA, or as depleted under the MMPA. Although interactions between FKWs and various fisheries are documented, scientific authorities have reported that the impact is not believed to be significant.

Thank you for the opportunity to comment upon this proposed rule. Please feel free to contact me if you wish to discuss these comments in more detail.

Very truly yours,

James M. Lynch

cc: Dr. William Hogarth, Asst. Administrator NOAA-Fisheries
Dr. Samuel Pooley, PIRO Acting Regional Administrator
Ms. Kitty Simonds, Executive Director WPRFMC
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